IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT

JAIPUR BENCH, JAIPUR.

1. S.B. Sales Tax Revision Petition No.53/2006
M/s. Lord Venketshwara Caterers
Vs.
C.T.O. Anti Evasion, Zone-I, Jaipur

2. S.B. Sales Tax Revision Petition No.52/2006
M/s. Lord Venketshwara Caterers
Vs.
C.T.O. Anti Evasion, Zone-I, Jaipur

3. S.B. Sales Tax Revision Petition No.50/2006
M/s. Lord Venketshwara Caterers
Vs.
C.T.O. Anti Evasion, Zone-I, Jaipur

Date of Judgment :: 30th July, 2007

Hon'ble Dr. Vineet Kothari, J.

Mr.Devendra Kumar)
Mr.Dinesh Kumar) for the petitioner – assessee.

Mr.R.B. Mathur)
Mr.Amit Ratnawat) for the respondent - revenue.

REPORTABLE

1. These three revision petitions filed by the petitioner – assessee are directed against the impugned order of the Tax Board, Ajmer whereby the Tax Board, Ajmer allowed the revenue's appeals and restored the penalty under Section 65 of the Rajasthan Sales Tax Act, 1994 (for short 'the Act') for Assessment Years 1997-98, 1998-99 and 1999-2000, therefore,

the same are being disposed of by this common order.

2. The petitioner – assessee was running a canteen for serving foods and drinks in the factory premises of M/s. Electrolux Maharaja International Limited., Shahajahanpur for the employees of the said Company and it received 75% of the subsidy from the Employee Welfare Fund and the employees were paying only 25% of the cost of food or breakfast served in the said canteen. The said petitioner – assessee did not obtain any registration under the Sales Tax Law nor it collected any sales tax from the employees of the said Company. On a survey made by the assessing authority on 28.12.1999, it was found by the assessing authority that the assessee was liable to get itself registered and pay the tax on the sale of such food items in the canteen and accordingly, by an assessment order dated 14.3.2000, the assessing authority passed an order imposing the tax, interest and penalty at double the rate of tax upon the petitioner – assessee. The position of tax, interest and penalty for these three years is given below in the form of a chart:-

Year	***Tax***	***Interest***	***Penalty***	***Surcharge***
1997-98	66,033.00	35,657.00	1,32,063.00	--
1998-99	1,23,666.00	56,095.00	2,67,118.00	9,893.00
1999-2000	72,215.00	14,842.00	1,64,908.00	7,239.00

3. The petitioner – assessee immediately got itself registered as a dealer without prejudice to his right to contend that such sale of food items was not taxable under the Act and it was so registered by the assessing authority with effect from the date of commencement of its business, namely, 1.10.1997 and the petitioner – assessee also paid the tax along with the interest imposed by the assessing authority. The issue, therefore, in the present revision petitions is only pertaining to penalty imposed under Section 65 of the Act at double the quantum of tax imposed.

4. The first appeal filed by the petitioner – assessee to the extent of penalty under Section 65 of the Act was allowed by the learned Deputy Commissioner (Appeals), however, imposition of tax and interest was upheld. Therefore, aggrieved by setting aside of penalty, the Revenue went up in second

appeal before the Tax Board, which came to be allowed by the Tax Board vide the impugned order dated 26.10.2005 restoring the said penalty. Hence, these revision petitions at the instance of the petitioner – assessee before this Court.

5. Mr. Devendra Kumar, learned counsel appearing for the petitioner – assessee urged that imposition of the penalty under Section 65 of the Act was wholly unjustified because not only the transactions of sale were duly recorded in the books of accounts maintained by the petitioner – assessee in the regular course of business, but he also submitted that the assessee under a bonafide belief that the service of food items did not amount to sale liable for sales tax under the Act. On the strength of certain judgments of various High Courts, he did not obtain the registration under the Act, but as soon as he was given a notice in this regard, he not only obtained the registration, which was granted retrospectively with effect from the date of commencement of business i.e. on 1.10.1997, but no penalty for such non-registration was imposed by the assessing authority under Section 59 of the Act, which provides for such a penalty. He submitted that in the following three judgments, the different

High Courts held that sale of food in a canteen maintained in the factory premises, as per the provisions of Factories Act, did not amount to business and such service of food, drink etc. was not liable to sales tax; (i) Commissioner of Sales Tax, M.P. Vs. Hukumchand Mills Ltd. **(1988) 68 STC 379 (HP)**; (ii) Tata Iron & Steel Company Ltd. Vs. The State of Bihar and Others **(1985) 58 STC 302** (Full Bench of Patna High Court) and (iii) Fort Gloster Industries Ltd. Vs. Member, Board of Revenue, West Bengal **(1970) Vol.26 STC 141** (Calcutta High Court). He, however, frankly submitted that after 42nd amendment of the Constitution of India adding Article 366(29A) in the Constitution of India and consequential amendment in Rajasthan Sales Tax Act, 1954 w.e.f. 1.4.1987 and thereafter in R.S.T. Act, 1994 such service of food and drink is undoubtedly a sale taxable under these enactments and, therefore, as far as tax and interest is concerned, he has not raised any grievance about that. He, however, submitted that it was not at all a fit case for imposition of a penalty under Section 65 of the Act for avoidance and evasion of tax. He also urged that since the assessee was under a bonafide belief about his liability to get registered and pay tax as he was receiving subsidy from the Company and no

penalty was imposed under Section 59 of the Act for non-registration while granting registration to him with retrospective effect from 1.10.1997 and since all the transactions were duly recorded in the books of accounts and those very figures were made the basis of imposition of the tax and interest by the Assessing Authority, it was not at all a fit case for imposition of the penalty under Section 65 of the Act. He relied upon the various judgments in support of his submission. The list of these cited cases is as below:-

1. Hindustan Steel Ltd. Vs. The State of Orissa (1970) 25 STC 211 (SC)

2. Murarilal Ahuja & Sons Vs. The Board of Revenue and Others (1986) 61 STC 393 (Raj.) (DB)

3. The Cement Marketing Co. India Ltd. Vs. The Assistant Commissioner of Sales Tax, Indore and Others (1980) 45 STC 197 (SC)

4. Vijay Hosiery Mills Vs. The State of Rajasthan (1980) 45 STC 345 (Raj.) (DB)

5. Commercial Taxes Officer, Special Circle, Pali Vs. Sojat Lime Co. (1989) 74 STC 288 (Raj.) (SB)

6. Commercial Taxes Officer Vs. Rajdhani Wines (1992) 87 STC 362 (Raj.) (SB)

7. Commercial Taxes Officer Vs. Weston Electronics Ltd. (1992) 87 STC 522 (Raj.) (SB)

8. Assistant Commercial Taxes Officer Vs. Kumawat Udyog (1995) 97 STC 238 (Raj.) (SB)

9. Commercial Taxes Officer Vs. Baran Co-operative Marketing Society Ltd. (1994) 93 STC 239 (Raj.) (SB)

10. Commercial Taxes Officer Vs. Birdhichand Banshidhar (1994) 93 STC 346 (Raj.) (SB)

11. Spectrum Foto Colour Labs Pvt. Ltd. Vs. Commercial Taxes Officer, Anti Evasion, Jodhpur (1980) 110 STC 145 (RTT).

6. As against this, Mr.R.B. Mathur, learned counsel appearing for the respondent – revenue, urged that the imposition of the penalty was justified because there was no reason with the assessee not to get himself registered and pay the tax as applicable on the sale of food items in the canteen as the position of taxability of these items was settled by amendment in law consequent to 42nd amendment to the Constitution of India. He urged that had the assessing authority not carried out any survey at the business place of the assessee, he would not have paid any tax and thus, it was a clear case of evasion of tax by him and the penalty deserves to be imposed upon him. He relied upon the following judgments in support of his submission, namely, (i) Kishori Lal Rakesh Kumar Vs. Commissioner, Sales Tax, U.P., Lucknow **(1985) 59 STC 323**

(All.), Commissioner of Sales Tax Vs. Prakash Trading Co. **(1982) 51 STC 342 (All.),** Commissioner of Income Tax (Additional) Vs. I.M. Patel and Co. **(1992) 196 ITR 296,** Director of Enforcement Vs. M/s. MCTM Corporation Pvt. Ltd. and Others **(AIR 1996 SC 1100**, **251 ITR 199 ST and (2006) AIR SC 2287**.

7. He urged that there was no need to establish mens rea on the part of the assessee for imposition of the penalty under Section 65 of the Act in view of the clear fact that the assessee was liable to pay tax on sale of such food items and, therefore, he submitted that the present revision petitions deserve to be dismissed.

8. Having considered the rival submissions and case laws cited at the bar by both the parties and after careful consideration of the record of the case, this Court is of the opinion that the present revision petitions deserve to be allowed and the penalty imposed and restored by the Assessing Authority and the Tax Board respectively deserves to be set aside.

9. It is true that the sale of food items in a canteen in factory premises even as per requirement of Factories Act and other Labour Legislation is a taxable event under the R.S.T. Act and is exigible to sales tax under the R.S.T. Act particularly after amendment in law w.e.f. 1.4.1987 consequent upon 42nd amendment in the Constitution of India, but the consideration for imposition of the penalty for concealment of taxable turnover and taxable sales are different. Admittedly, just upon survey of the business premises, when a notice was served upon the assessee pointing out his liability to get registered and pay tax was notified to him, he obtained such registration with retrospective effect from the date of commencement of his business, namely, 1.10.1997. He also paid the tax along with interest as imposed by the assessing authority without any demur. It is also not in dispute that all the transactions of sale on the basis of which taxable turnover by the assessee was computed by the assessee, were duly recorded in the books of accounts maintained by the assessee in regular course of business and on the basis of such books of accounts only the assessing authority framed the assessment and imposed the tax. It is not a case of concealment of turnover or filing of inaccurate

particulars as is envisaged under Section 65 of the Act. Both Sections 59 and 65 are reproduced hereunder for ready reference:-

> "**59**. **Penalty for not making application for registration**:- When any person has without reasonable cause failed to make an application to get himself registered as required under the provisions of this Act, within the time specified in the Act or prescribed in the Rules, the Assistant Commissioner, the Commercial Taxes Officer or any other officer having jurisdiction, as the case may be, may direct that such person shall pay by way of penalty in addition to fee payable by him, a sum not exceeding one thousand rupees.
>
> **65. Penalty for avoidance or evasion of tax** :- Where any dealer, whether or not registered, has concealed any particulars from any return furnished by him or has deliberately furnished inaccurate particulars therein or has concealed any transaction of sale or purchase from his accounts, registers and documents required to be maintained under this Act or has avoided or evaded tax in any other manner, the assessing authority may direct that such dealer shall pay by way of penalty, in addition to the tax payable by him under law, a sum equal to double the amount of tax avoided or evaded."

10. It is also noteworthy that the assessing authority while giving the registration to the assessee – petitioner chose not to impose any penalty in addition to the fees payable for registration despite a provision in this regard contained in

Section 59 of the Act. Section 65 of the Act empowering imposition of the penalty for avoidance or evasion of the tax can be invoked only if there is a deliberateness or guilty animus on the part of the petitioner – assessee to conceal his taxable turnover from any return furnished (no such return showing NIL taxable turnover was furnished by the assessee in the present case) or he has deliberately furnished inaccurate particulars or has concealed any transaction of sale or purchase from his accounts, registers and documents. It is not even a case of the revenue that these transactions were not recorded in the books of accounts maintained by the assessee. It is also not the case of the revenue that he filed a return claiming the said turnover to be exempt from the sale and contested this position.

11. In view of this, the question of assessee having a guilty animus or mens rea as they call it does not arise in the present case. An assessee is even entitled to claim that a particular sale is not taxable sale and it is exempt or non-taxable in view of certain provisions and judgments of the courts. The rejection of such bonafide contention by the authorities created under the Act or even by courts of law does not necessarily lead

to the conclusion that the assessee carried any mens rea or guilty animus in raising such contention and, therefore, penalty should be imposed for non-payment of tax in such circumstances. The imposition of penalty is never automatic and ipso facto. Such imposition of penalty has to be preceded by a reasonable conclusion arrived at by the concerned authority that there is a conduct contumacious or a guilty intention on the part of the subjector assessee in not paying the tax. Such reasonable conclusion can be arrived at only after complying with the principle of natural justice – giving of a show cause notice to assessee and after considering and deciding his objections by a speaking order. Nothing of this sort has been done by the assessing authority in the present case.

12. In **Commissioner of Income Tax, West Bengal I Vs. Anwar Ali (1970) 76 ITR 696**, while considering Section 28(1)(c) of the Indian Income-tax Act, 1922, which dealt with imposition of penalty, their Lordships of the Supreme Court held that before penalty can be imposed the *entirety* of *circumstances must reasonably point to the conclusion* that the disputed amount represented income and that the assessee had

consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars. It may be stated here that formerly in the provisions relating to imposition of penalty in the Act of 1961 in the second part of Section 271(1)(c), the word “deliberately” was there. The expression used was “deliberately furnished inaccurate particulars of such income”. The word “deliberately” was omitted by the Finance Act, 1964, w.e.f. 1st April, 1964.

13. Anwar Ali's case (1970) 76 ITR 696 (SC) was followed in Anantharam Veerasinghaiah & Co. Vs. Commissioner of Income-tax, A.P. (1980) 123 ITR 457 (SC). While considering the question of imposition of penalty, it was observed as under:-

> “This is the provision as it stood at the relevant time. It is now settled law that *an order imposing a penalty is the result of quasi-criminal proceedings and that the burden lies on the revenue to establish that the disputed amount represents income and that the assessee has consciously concealed the particulars of his income or has deliberately furnished inaccurate particulars*: Commissioner of Income-tax Vs. Anwar Ali (1970) 76 ITR 696 (SC). It is for the revenue to prove those ingredients before a penalty can be imposed. Since the burden of proof in a penalty proceeding varies from that involved in an assessment proceeding, a finding in as

> assessment proceeding that a particular receipt is income cannot automatically be adopted as a finding to that effect in the penalty proceeding. *In the penalty proceeding the taxing authority is bound to consider the matter afresh on the material before it* and in the length of the burden who proved resting on the revenue, to ascertain whether a particular amount is a revenue receipt. No doubt, the fact that the assessment order contains a finding that the disputed amount represents income constitutes good evidence in the penalty proceeding *but the finding in the assessment proceeding cannot be regarded as conclusive for the purpose of penalty proceeding.* That is how the law has been understood by this court in Anwar Ali's case (1970) 76 ITR 696 (SC), and we believe that *to be the law still. It was also laid down that before a penalty can be imposed the entirety of the circumstances must be taken into account and must point to the conclusion that the disputed amount represents income and that the assessee has consciously concealed particulars of his income or deliberately furnished inaccurate particulars."*

14. The Division Bench of this Court in Vijay Hosiery Mills Vs. State of Rajasthan **(1980) 45 STC 345**, held as under:-

> "Taking all the circumstances into consideration, we are inclined to hold that it cannot be said that there was any mens rea or guilty intention on the part of the petitioner when it claimed exemption on the sale of banians on the ground that banian is a garment and not a hosiery product. It cannot, therefore, be said that the petitioner fraudulently evaded or avoided payment of tax or concealed its liability to tax.

> Having come to the conclusion that there is no mala fide or mens rea on the part of the petitioner, we must hold that the taxing authorities were not justified in imposing penalty on the petitioner under section 16(1)(i) of the Act".

15. While dealing with the case arising out of Section 16(1)(e) of the Rajasthan Sales Tax Act, 1954, which is pari materic with Section 65 of the R.S.T. Act, 1994, this Court in **CTO Vs. Sojat Lime Co. (1989) 74 STC 288**, held as under:-

> "It is obvious that the penalty is attracted when the act of the dealer is a conscious act of concealment of any particulars or of deliberate furnishing of inaccurate particulars in his return. It has been held in the Commissioner of Income-tax, West Bengal V. Anwar Ali (1970) 76 ITR 696 (SC); AIR 1970 SC 1782 while construing a similar provision in section 28(1)(c) of the Income-tax Act, 1922 that mere rejection of the explanation of the assessee as false does not automatically attract penalty in such a situation and before the penalty can be imposed it must be held that the assessee had consciously concealed the particulars or had deliberately furnished inaccurate particulars. In the present case the Tribunal has held that there was no attempt at concealment by the dealer and his act was bona fide, inasmuch as, the transaction was shown in the books of accounts produced before the departmental authorities and the same was not shown in the return since the dealer contended that the transaction was not exigible to sales tax. There is thus no infirmity in the Tribunal's order setting aside the penalty imposed by the assessing authority under section 16(1)(e) of the Rajasthan Sales Tax

Act".

16. In fact, there are series of such judgments and one need not multiply authorities on this issue and the position of law is settled that penalty under Section 65 of the Act cannot be imposed on the assessee unless the revenue establishes that there is deliberateness on the part of the assessee or conscious concealment of taxable turnover with the purpose to avoid or evade the tax and such penalty cannot be imposed merely because the contention of the assessee that particular sale is not taxable is rejected or explanation furnished by him is not found to be acceptable by the revenue. Something more is required to be done by the revenue to bring on record such material which after being confronted to assessee and his explanation with regard to the same being decided clearly points out that he carried a malafide intention of not paying the tax in question and concealed such taxable turnover and sale from the revenue and failed to pay tax thereon without any reasonable cause.

17. The judgment in the case of **Director of Enforcement Vs. M/s. MCTM Corporation Pvt. Ltd. and**

Others (supra) wherein the Hon'ble Supreme Court held that penalty under Section 23(1)(a) of the Foreign Exchange Regulation Act, 1947 stood attracted as soon as there was violation of Section 10(1) of the Act where any person who has a right to receive any foreign exchange and payment in rupees in India fails to get the foreign exchange repatriated within a reasonable time after the right to receive the same accrues, the commission of offence under Section 10(1) is complete and for breach to such "***civil obligation***" attracted penalty under Section 23(1)(a) of the Act and mens rea is not an essential ingredient for holding a delinquent liable to pay penalty under the said provisions. The said judgment relied upon by the Revenue in the present case is, with great respect, clearly distinguishable because the requirement of repatriation of foreign exchange within reasonable time cannot be equated with concealment of turnover or filing of inaccurate particulars taxable turnover as in the present case. Where the obligation is specific and clear, failure to discharge such civil obligation may attract the penalty without establishing mens rea but where a legal debate is possible on the taxability itself, the straight jacket formula of imposition of penalty cannot be invoked. In umpteen

number of cases, the Hon'ble Supreme Court has held that without establishing mens rea, no penalty can be imposed and imposition of the penalty is not automatic or ipso facto. Likewise other judgments relied upon by the learned counsel for the Revenue for imposition of the penalty in the events like failure to file return etc. are not applicable in the present case. In fact, in one of the judgments cited by the learned counsel for the Revenue, namely, Commissioner of Sales Tax Vs. Prakash Trading Co. (supra), the Hon'ble Supreme Court upheld the orders of the appellate authority where they had set aside the penalty for not obtaining the registration by a dealer under the U.P. Sales Tax Act.

18. The judgments cited by learned counsel for the revenue are in different context and imposition of the penalty in those cases was imposed with failure of comply with statutory obligations of doing certain things under the Act like filing of return before the stipulated dates and failure to make declaration under particular enactments. The said cases are distinguishable and do not apply to the facts and circumstances of the present case.

19. Consequently, these revision petitions are allowed and the impugned order of the Tax Board dated 26.10.2005 and those passed by the assessing authority in so far as they imposed the penalty under Section 65 of the Act upon the petitioner – assessee are set aside and the order of the Deputy Commissioner (Appeals) in favour of the assessee is restored and it is held that no penalty under Section 65 of the Act could be imposed upon the petitioner – assessee in the aforesaid circumstances. No order as to costs.

[**Dr. Vineet Kothari**],**J.**

S.S.
Jr.P.A.